

A PEKAT TEKNOLOGI SDN BHD v. NOVARIS PTY LTD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
SM KOMATHY SUPPIAH JC
[CIVIL SUIT NO: 22NCVC-298-06-2014]
8 DECEMBER 2014

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CONTRACT: Breach – Sale of goods – Manufacturer delivered goods which were defective and of unmerchantable quality – Whether defects proved – Whether distributor relied on skill and judgment of manufacturer – Whether distributor suffered losses – Whether transaction based on implied warranty of fitness – Whether distributor could be reimbursed – Sales of Goods Act 1957, s. 16(1)(a)

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CONTRACT: Breach – Damages – Burden to prove loss – Whether crucial documents produced – Whether damages proven

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EVIDENCE: Presumptions – Adverse inference – Claim for breach of contract – Whether crucial documents produced – Whether damages proven – Whether presumption under s. 114(g) of Evidence Act 1950 arose for failure to produce documents

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The first defendant manufactured and sold surge protective devices including lightning protection and earthing systems. The second defendant manufactured and sold Novaris surge protective devices. Pursuant to an oral agreement, the plaintiff was appointed as the sole distributor of the defendants' products, particularly the Novaris Multimov Shunt Surge Diverter or Search Arrestor 3P 40 KA/PH (SD3-40N) and 3P 80KA/PH (SD3-80N) ('Novaris SPDs' or 'the devices'). The plaintiff successfully secured six contracts ('Putrajaya projects') for the sale and supply of the Novaris SPDs to Putrajaya Holdings ('PJH'), the developer of the Putrajaya projects. The Novaris SPDs were developed by the first defendant for the Putrajaya projects. The plaintiff purchased the Novaris SPDs from the second defendant. After the installation of the Novaris SPDs in the buildings

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in the Putrajaya projects, PJH complained that the LED lights in the SPDs were faulty as they were continuously flashing and it was impossible to tell whether they were functioning properly. All the Novaris SPDs that were installed in the six projects were removed and replaced, but the problem persisted. Investigations showed that the problem was with the capacitors in the Novaris SPDs. The capacitors had been purchased by the second defendant from a company called LKL Sunrise Electronic Sdn Bhd ('LKL Sunrise'). The capacitors were then changed but the problem persisted. The plaintiff was terminated as the sole distributor of both the defendants. At the request of PJH, the plaintiff replaced all the Novaris SPDs with Furse ESP415M1 ('Furse SPDs'). The plaintiff then brought this action against the

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defendants to recover the losses it suffered arising from the faulty SPDs supplied by the defendants, contending that the Novaris SPDs supplied by

the second defendant were defective and not of merchantable quality. The second defendant counterclaimed for damages for breach of the distribution agreement alleging that it had suffered loss of profits as a result of the plaintiff selling its competitor's products without its knowledge. The issues which arose were: (i) whether the plaintiff had a cause of action against the first defendant; (ii) whether the plaintiff was a co-manufacturer of the Novaris SPDs; (iii) whether the Novaris SPDs supplied to the plaintiff were defective and not of merchantable quality; (iv) whether the second defendant gave a fitness warranty to the plaintiff; (v) whether the damages claimable; (vi) whether the plaintiff was entitled to an indemnity from the defendants; and (vii) whether the second defendant had proved its counterclaim.

Held (dismissing plaintiff's claim and second defendant's counterclaim):

- (1) The statement of claim failed to establish the legal basis of the first defendant's liability when the devises were purchased from the second defendant. This was not a case where the plaintiff had purchased the first defendant's products through the second defendant. Hence, the plaintiff had no cause of action against the first defendant. Its claim for damages in respect of defective Novaris SPDs laid solely against the second defendant. (para 22)
- (2) The second defendant's contention that the devises were not defective was untenable and could not be accepted. The continuous flashing of the green light on the devises rendered the devices defective. As a result, PJH's instruction for them to be replaced was not unreasonable. The second defendant knew that the plaintiff relied on its skill and judgment to supply Novaris SPDs that would meet the specifications of PJH. The transactions between it and the second defendant were based on an implied warranty of fitness as provided in s. 16(1)(a) of the Sales of Goods Act 1957. (para 35)
- (3) A party claiming reimbursement must prove the actual loss it has suffered as a result of the breach committed by the contract breaker. The burden was on the plaintiff to show the number of devises that were replaced. The best evidence to establish the number of units that the plaintiff had replaced and the expenses incurred would be the relevant purchase orders, delivery orders and invoices. However, these crucial documents were not produced. Instead, the plaintiff relied on documents that did not advance its case. The non-production of the purchase orders, delivery orders and invoices called for the invocation of s. 114(g) of the Evidence Act 1950, that if produced, these documents would not support its case. Hence, the plaintiff had failed to prove the damages suffered due to the defective devises supplied to it; (*Popular Industries Ltd v. Eastern Garment Manufacturing Sdn Bhd*, refd). (para 47)

- A (4) If a claim was brought by a third party against the plaintiff, the plaintiff was entitled to seek indemnification from the second defendant by bringing the latter as a third party in those proceedings. Therefore, the plaintiff's claim that it be indemnified by the defendants in respect of any claim that may be brought against it in respect of the defective
- B Novaris SPDs was not allowed. (para 54)
- (5) The absence of any explanation for the delay in seeking damages for breach of the distribution agreement exposed the defendant's allegations made in support of the counterclaim to be completely lacking in substance. In any event, no documentary evidence was adduced to
- C support the alleged losses suffered by the second defendant. (para 54)

Case(s) referred to:

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA (*refd*)
Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC (*refd*)

- D *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119 (*refd*)
Wells (Merstham) Ltd v. Buckland Sand and Silica Co Ltd [1964] 1 All ER 41 (*refd*)

Legislation referred to:

Evidence Act 1950, s. 114(g)
 Sales of Goods Act 1957, s. 16(1)(a)

- E **Other source(s) referred to:**

Halsbury's Laws of Malaysia, vol 24, 2004, p 245

For the plaintiff - Hemalatha Parasa Ramulu; M/s Skrine

For the defendant - Bharti Seth (Kokilah Kanniappan with her); M/s Bharti Seth & Assocs

- F *Reported by Amutha Suppayah*

JUDGMENT

SM Komathy Suppiah JC:

- G [1] The plaintiff purchased two products known as the Novaris Multimov Shunt Surge Diverter or Search Arrestor 3P 40 KA/PH (SD3-40N) and 3P 80KA/PH (SD3-80N) (hereinafter referred to as "Novaris SPDs" or "the devises") from the second defendant, sometime between 2009 till 2012. Its claim against the first and second defendants in this action arises from these transactions.
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[2] By para. 30 of its statement of claim, the plaintiff sought the following principal reliefs and declarations:

- (i) A declaration that the first and defendants provide an indemnity to the plaintiff that:
- I (a) indemnifies the plaintiff and keeps the plaintiff indemnified against all demands, claims, liabilities, losses, costs and expenses whatsoever (including all legal and other costs, charges and

- expenses the plaintiff may incur in connection with the 4GB & 4G9 Putrajaya Project, the 4G10 & 4G11 Putrajaya Project and the 2C2 & 5G2 Putrajaya Project ("Putrajaya Projects"), or in enforcing, or attempting to enforce, the plaintiff's rights arising in relation to or out of the Putrajaya Projects; A
- (b) the first and second defendants shall pay and reimburse such sums resulting from the demands, claims, liabilities and losses referred to in paragraph (a) hereinabove to the plaintiff on demand, together with interest on them (as well after as before judgement), from the date when they are first paid or incurred by the plaintiff until payment of them by the first and second defendants in full, at the interest rate of 6% per year above the cost to the first and second defendants (as conclusively determined by the first and second defendants) or acquiring any necessary funds in such currency and manner as the plaintiff may from time to time decide; the first and second defendants shall not being able to rely on any set-off or counterclaim whatsoever so as to in any way extinguish or reduce their liability to plaintiff under this indemnity; B C D
- (c) that the first and second defendants agree thin indemnity shall constitute a separate and independent obligation on their part and shall continue in full force and effect notwithstanding any judgement or order obtained by the Court herein; E
- (d) that the first and second defendants irrevocably authorise the plaintiff to make any payments or to comply with any demands that appear or purport to be claimed or made under the Putrajaya Project without any reference to or further authority from the first and second defendant without inquiry into the justification for them or into the validity, genuineness or accuracy of any statement or certificate received by the plaintiff with respect to the Putrajaya Projects and despite any contestation on the first and second defendant part and they agree that any such claim or demand shall be binding on them and shall as between the plaintiff and the first and second defendant be accepted by them as conclusive evidence that they were liable to pay or comply with it; F G
- (e) that any modifications, amendments, renewals or extensions of the Putrajaya Projects made either in accordance with its original terms or upon the plaintiff's request will continue to bind the first and second defendants as well as the beneficiaries the Putrajaya Projects and the first and second defendant's liability under this indemnity shall continue to apply to any such Putrajaya Projects as so modified, amended, renewed or extended from time to time. H
- (ii) damages in the sum of RM34,736.00; I

- A (iii) Alternatively damages in the sum of RM670,000.00 (being inclusive of cost of the Furse unit at RM1200 per unit and cost of installation);

Background Facts

- B [3] The first defendant, is a company incorporated in Tasmania, Australia. It has been in the business of manufacturing and selling surge protective devices including lightning protection and earthing systems in Australia. It has been manufacturing surge protection devices globally since 1993.

- C [4] The second defendant is a company incorporated in Malaysia. It manufactures and sells Novaris surge protective devices in Malaysia.

- D [5] The plaintiff was appointed as the sole distributor of the first and second defendant's products in Malaysia, particularly the Novaris SPDs. The plaintiff's appointment as distributor was pursuant to an oral agreement between them.

- E [6] Sometime in 1999, the plaintiff successfully secured six contracts ('Putrajaya projects') for the sale and supply of the Novaris SPDs, through a government tender exercise. It had secured the tender by submitting surge protective device specifications as required by Putrajaya Holdings ('PJH'), the developer of the said Putrajaya projects in respect of these six construction projects.

- F [7] The Novaris SPDs were developed by the first defendant for the said Putrajaya projects. The plaintiff purchased the Novaris SPDs required for the Putrajaya projects from the second defendant. The Novaris SPDs were supplied and delivered to the plaintiff sometime between 2009 till 2012

- G [8] After the installation of these Novaris SPDs in the buildings in the Putrajaya projects, PJH complained that the LED lights in the SPDs were faulty as they were continuously flashing and it was impossible to tell whether they were functioning properly. At the request of PJH, all the Novaris SPDs that had been installed in the six projects were removed and replaced, but the problem persisted. The first defendant then sent its engineer, one Tristan to investigate the problem. It was subsequently ascertained that the problem was with the capacitors in the Novaris SPDs. The capacitors had been purchased by the second defendant from a company called LKL Sunrise Electronic Sdn Bhd ("LKL Sunrise"). The capacitors were then changed but the problem persisted.

- H [9] On 28 May 2012, the plaintiff was terminated as the sole distributor of both the first and second defendants.

- I [10] At the request of PJH, the plaintiff replaced all the Novaris SPDs with Furse ESP415M1 ('Furse SPDs').

[11] The plaintiff then brought this action against the first and second defendants to recover the losses it suffered arising from the faulty SPDs supplied by the defendants. It claimed, amongst others, the amount paid to Furse for the purchase of its SPDs. The second defendant added LKL Sunrise as a third party in these proceedings. LKL Sunrise neither entered an appearance nor filed a defence, and the second defendant proceeded to entered judgment against it.

Case For The Plaintiff

[12] It is the plaintiff's case that the Novaris SPDs supplied by the second defendant were defective and not of merchantable quality. The defendants knew that the devises were purchased for the Putrajaya projects and were subject to PJH's approval. It was contractually obligated to PJH to replace these devises if instructed to do so by PJH. PJH had rejected the devises because of the faulty capacitors inserted in them. The second defendant were consequently liable for all losses and expenses incurred in replacing the Novaris SPDs .

[13] It is the plaintiff's case that the first defendant was liable on the basis of its representation/warranty that the Novaris SPDs manufactured by the second defendant were fit for the purpose for which they were intended. It was also part of its case that they had purchased the items from the second defendant on the basis of the warranty given by the first defendant.

Case For The Defendants

[14] The case for the first defendant was that the plaintiff had no cause of action against it as the Novaris SPDs had been manufactured and supplied by the second defendant. It denied that it had given any warranty in respect of the devises manufactured by the second defendant. There was no privity between it and the plaintiff.

[15] In the alternative, the first and second defendants denied that the SPDs were defective and were not of merchantable quality. It was alleged that at all material times, the SPDs were fully functional and the only component in the devise that was defective was the capacitor. However, notwithstanding the faulty capacitor, the SPDs were still able to perform their function. The other defences were that the plaintiff was a co-manufacturer of the Novaris SPDs and no warranty was given to the plaintiff or its customers.

[16] The second defendant's counterclaim was for damages for breach of the distribution agreement. It is alleged that it had suffered a loss of profits as a result of the plaintiff selling its competitor's products without its knowledge.

A Witnesses

[17] The plaintiff called four witnesses at trial. They were its directors Chin Soo Mau ('PW1'), Wee Chen Aik ('PW3'), Tai Yee Chee ('PW4') and an engineer with PJH, Norizan bin Arip Shah ('PW2'). The witnesses for the defendant were Phillip Richard Tompson ('Phil') ('DW1'), Wong Hoong Chuan ('DW2') and Tristan James King ('Tristan') ('DW4'). Phil was a director of both the first and second defendants, whilst Tristan was an engineer with the first defendant. DW2 was the general manager of the second defendant.

C [18] I shall refer to their evidence later in this judgment.

Issues For Determination

[19] The issues to be decided in this present suit may be summarised as the following:

- D (i) Whether plaintiff has a cause of action against the first defendant?;
- (ii) Whether the plaintiff was a co-manufacturer of the Novaris SPDs?;
- (iii) Whether the Novaris SPDs supplied to the plaintiff were defective and not of merchantable quality?;
- E (iv) Whether the second defendant gave a fitness warranty to plaintiff?;
- (v) If so, the damages claimable?;
- (vi) Whether the plaintiff is entitled to an indemnity from the defendants?;
- (vii) Whether plaintiff entitled to an indemnity? and
- F (viii) Whether the second defendant has proved its counterclaim?

Issue 1: Whether The Plaintiff Has A Cause Of Action Against The First Defendant?

G [20] The basis of the plaintiff's cause of action against the first defendant is pleaded in para. 22 of the statement of claim as follows:

H At all material times the said parties were also made to understand that the plaintiff had no control over the manufacture of the Novaris SPD and that all defects detected in the same were being addressed solely by the first defendant. A performance warranty was provided by the first and second defendants upon the sale of the Novaris SPD units by the plaintiff which indicated that the first and second defendants would be liable to the plaintiff for the performance of the Novaris SPD units purchased. Further at all material times the said parties were made to understand that the plaintiff were merely an agent who were distributing the Novaris SPD for their Principal, the first and second defendants.

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[21] In view of the basis of the formulation of the plaintiff's claim, it will be useful to set out the relevant paragraphs in the statement of claim which deal with how the sale and purchase transactions in relation to the Novaris SPDs were carried out. The paragraphs read:

Paragraph 7

... At all material times, the terms of agreement for the sale, supply and distribution of the Novaris SPD upon which the plaintiff and the first and second defendants acted on was entirely by purchase and delivery orders and concluded either orally, by correspondence or by way of conduct. There was no written distribution agreement executed between the plaintiff and the first and second defendants.

Paragraph 8

Since between 2009 till the middle of 2012, the plaintiff received various purchase orders for various models of the Novaris SPD to be used in various construction projects in and around Malaysia. Amongst others the plaintiff received purchase orders for various models of the Novaris SPD to be used in the following projects which are being developed by Putrajaya Holdings (PJH).

Paragraph 9

The plaintiff received purchase orders for various Novaris SPD from Kejuruteraan Powerwell Sdn Bhd (Powerwell) to be used in the installation of the electrical framework in the construction and completion of a government office building consisting of office tower, related works at basement and external works at Lot 4G8 and 4G9, Pusat Pentadbiran Kerajaan Persekutuan, Wilayah Persekutuan Putrajaya ("4G8 & 4G9 Putrajaya Project") sometime between 2009 till 2012.

Paragraph 11

The plaintiff in turn placed purchase orders (with case being paid on delivery and a credit term of 60 days from the end of the month of the invoice) with the second defendant for the Novaris SPD requested by Powerwell and secured delivery of the requested units by way of a delivery order. Upon installation of these units Powerwell found in particular the SD3-40N and SD3-80N, to be defective and notified the plaintiff. The plaintiff subsequently notified the first and second defendants of the defects, and the second defendant supplied a replacement batch of the said SD3-40N and the SD3-80N to replace the defective versions. The replacement batch of the SD3-40N and the SD3-80N also exhibited defect and could not be used for the electrical framework as required.

[22] The above quoted paragraphs show that the devises were purchased from the second defendant. The complaint made against the first defendant in para. 22 of the statement of claim is that the first defendant had provided a warranty upon the sale of the Novaris SPDs. The question that arises, if the devises were purchased from the second defendant, what is the basis

A for contending that a warranty had been given by the first defendant. The statement of claim fails to establish the legal basis of the first defendant's liability when the devices were purchased from the second defendant.

[23] However, in submission the plaintiff clarified that its cause of action against the first defendant was formulated on the basis that it had purchased the Novaris SPDs from the second defendant in reliance on a warranty given by the first defendant that the goods manufactured by the second defendant were fit for the purpose they were purchased. In this regard, reference was made to *Halsbury's Laws of Malaysia* vol. 24, Sale of Goods [2004] where the learned authors stated at para. [410.058] p. 245 that a warranty maybe given in consideration of an agreement to enter into a contract of sale of the goods to which the warranty relates with a party other than a person giving the warranty.

[24] The plaintiff also relied on the case of *Wells (Merstham) Ltd v. Buckland Sand and Silica Co Ltd* [1964] 1 All ER 41 in support of this proposition. There, the defendants warranted to the plaintiffs that their "BW sand" conformed to a certain analysis. Sand conforming to that analysis would be suitable for use in chrysanthemum growing which to the defendants knowledge was the purpose for which sand was required by the plaintiffs. To save carriage costs, the plaintiffs placed their orders with a third party who then bought BW sand from the defendants, but did not tell the defendants that the sand was for resale to the plaintiffs. The sand delivered did not conform to the warranty, in consequence of which the plaintiffs suffered loss. In an action, for damages, for breach of warranty, Edmund Davies J, observed:

F The only two ingredients required to bring about a collateral contract containing a warranty were a promise or assertion by the vendor as to the nature, quality or quantity of the goods, which the purchaser might reasonably regard as being made *animo contrahendi*, and acquisition by the purchaser of the goods in reliance on that promise or assertion (see p. 45, letter i, to p. 46, letter a, post); in the present case a warranty was here expressed that the constituents of BW sand were as stated in the analysis, so that it was irrelevant that the order was placed by the plaintiffs through a third party, and the plaintiffs were entitled to recover damages for breach of warranty.

...

H Then does it make any difference that, the warranty having been given to the plaintiffs, all the purchases other than the first were made by the plaintiffs from a third party? If that question demands in law an affirmative answer, the result would not be justice, for, as I have said, it was purely fortuitous that all the loads were not sold by the defendants direct to the plaintiffs. But in my judgment such an affirmative answer is not required, as several reported decisions indicate. Thus, in *Brown v. Sheen and Richmond Car Sales Ltd, Shanklin Pier Ltd v. Detel Products Ltd* and

Andrews v. Hopkinson, all tried at first instance, and *Yeoman Credit Ltd v. Odgers*, in the Court of Appeal, the warranty given by the defendant was held enforceable notwithstanding that the main contract was subsequently entered into between the plaintiff and a third party. As McNair J said in the second case ([1951] 2 All ER at p. 472, [1951] 2 KB at p. 856):

If, as is elementary, the consideration for the warranty in the usual case is the entering into of the main contract in relation to which the warranty is given, I see no reason why there may not be an enforceable warranty between A and B supported by the consideration that B should cause C to enter into a contract with A or that B should do some other act for the benefit of A.

And if Clark gave the warranty which I have found that he did, it would be absurd in the circumstances of the case to regard that warranty as being impliedly restricted to orders placed directly by the plaintiffs with the defendants.

As between A (a potential seller of goods) and B (a potential buyer), two ingredients, and two only, are in my judgment required in order to bring about a collateral contract containing a warranty: (1) a promise or assertion by A as to the nature, quality or quantity of the goods which B may reasonably regard as being made *animo contrahendi*, and (2) acquisition by B of the goods in reliance on that promise or assertion. As Mr Wedderburn expresses it in the *Cambridge Law Journal*, 1959, at p. 79:

... the consideration given for the promise is no more than the act of entering into the main contract. Going ahead with that bargain is a sufficient price for the promise, without which it would not have gone ahead at all.

A warranty may be enforceable notwithstanding that no specific main contract is discussed at the time when it is given, though obviously an *animus contrahendi* (and, therefore, a warranty) would be unlikely to be inferred unless the circumstances show that it was within the present contemplation of the parties that a contract based on the promise would shortly be entered into. Furthermore, the operation of the warranty must have a limitation in point of time which is reasonable in all the circumstances. But none of these considerations gives rise to difficulty in the present case. In my judgment, accordingly, the plaintiffs are entitled to recover the £2,500 claimed as damages for breach of the warranty that I find the defendants' manager gave. It has been conceded that this is the proper measure of damages, and, in any event, it is supported by the Court of Appeal decision in *Yeoman Credit v. Odgers*, to which I have already referred.

[25] In my view, the plaintiff's reliance on the principle in *Wells (Merstham) Ltd v. Buckland* ([24] *supra*) is misplaced as the facts in that case bear no relevance to the present. In that case, the sand which was purchased by the

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- A plaintiff had come from the defendant's factory, albeit it was purchased through a third party. In the present case, the Novaris SPDs purchased by the plaintiff had not come from the first defendant. This is not a case where the plaintiff had purchased the first defendant's products through the second defendant.
- B [26] In the circumstances, the plaintiff has no cause of action against the first defendant. Its claim for damages in respect of defective Novaris SPDs lies solely against the second defendant.
- Issue 2: Whether The Plaintiff Was A Co-manufacturer With The Second Defendant For The SPDs?*
- C [27] It is the case for the second defendant that the plaintiff and itself were the co-manufacturers of the Novaris SPDs. The second defendant relied on four grounds to established that the plaintiff was a co-manufacturer:
- D (a) that all the SPDs carried the name of Pekat-Novaris on it;
- (b) that the plaintiff had declared itself as manufacturer of the SPDs to the world at large;
- (c) that the plaintiff had given the warranty to all its customers; and
- E (d) that the SPDs were manufactured in accordance with the specifications given by the plaintiff.
- [28] The plaintiff disputed the allegation that it was a co-manufacturer. It's answer to this allegation was that its name appeared on the product only as the distributor.
- F [29] On the evidence, it is plain that the plaintiff was not a co-manufacturer of the SPDs. I find no merit in the grounds relied on by the second defendant to contend that the plaintiff was a co-manufacturer. There is nothing improbable about the plaintiff's explanation that its name appeared on the devises to indicate that it was the supplier of the product and an authorised distributor of the defendant. A perusal of the draft international distributorship agreement indicates that in general, the first defendant permitted its distributors to attach to its products suitable means a notice bearing their name and address to indicate they are the supplier of the product and an authorise distributor of the defendant.
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- H [30] Crucially, and more importantly, if indeed the plaintiff was a co-manufacturer of the product, it cannot be gainsaid that there would have been discussions pertaining to the matter. It is unlikely that the defendants would have agreed to allow the plaintiff to claim to be a co manufacturer, without some formal arrangement between them. However, the second
- I defendant has not adduced any credible evidence to show that there was any discussion between them in relation to this and what were the terms of this arrangement.

[31] For these reasons, in my view, this is a baseless allegation that has been raised as an afterthought. A

Issue 3: Whether The SPDs Supplied To The Plaintiff Were Defective And Not Of Merchantable Quality?

[32] The gist of the plaintiff's case is that the Novaris SPDs supplied to it were defective and not of merchantable quality as they were not to the satisfaction of PJH. The LED in the Novaris SPDs was flashing a green light all the time and PJH had requested for their replacement. B

[33] The defendant's case is that the light was flashing as a result of a faulty capacitor in the LED, but otherwise the Novaris SPDs were fully functional at all material times. As such, the allegation that the devises were defective was baseless. C

[34] On this issue, it is vital to refer to the testimony of Tristan as to the problem which confronted the plaintiff and PJH as a result of the devises flashing continuously. In cross examination, he was asked whether it would be possible to tell whether the devises were functioning if it was flashing a green light continuously, and he answered in the negative: D

Q : Ok, Mr King I'm a lay person. I'm going to give you an analogy. Now assuming that. I will give you an analogy of a battery in a car as you are driving it? So there is a light which indicates whether the battery is not going properly or not yes? E

A : Yes.

Q : If it continues to flash wouldn't it make me worry. I mean I would be worried if it is flashing because I would never know whether the battery is functioning properly or not. Now I draw that analogy to this if it keeps flashing how will the person looking at it know whether it's getting full protection or not. F

Q : I would say that they can see, well from that's written on here that it would be a possibly a neutral earth fault but you would probably be get in contact with someone who knew about the device. G

Q : But you wouldn't know between the two, right?

A : No.

[35] In my view, the second defendant's contention that the devises were not defective is untenable and cannot be accepted in the light of Tristan's evidence. Clearly, neither the plaintiff nor PJH would have been in a position to tell the whether the devises were functioning or otherwise if the lights flashed all the time. In this regard, I turn to PW2's evidence as to why his employer, PJH instructed the main contractor to replace the Novaris SPDs: H
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- A DMU dimaklumkan oleh pihak main contractor WCT yang mengepilkkan surat daripada plaintiff yang mengepilkkan pula surat daripada defendan pertama bertarikh 26.03.2012 yang menyatakan bahawa unit SPD Novaris itu rosak sebab LED display (indicator) rosak – tetapi protection ada.
- B Tetapi amalan biasa JKR, adalah terang bahawa SPD tidak berfungsi, apabila indicator tidak bernyala atau warna – maka alasan tersebut tidak boleh diterima oleh DMU. Saya merujuk kepada mukasurat 115 Part B of the Common Bundle of Documents daripada defendan pertama.

- C Bila kita menyebut rosak, kecacatan adalah secara keseluruhan kepada unit tersebut bukannya secara komponen. Jadi sekiranya apa-apa kecacatan rosak pada unit tersebut, maka keseluruhannya dianggap rosak dan pihak terlibat perlu datang semula. Mengikut surat tersebut wakil defendan pertama sendiri sebenarnya telah datang ke tapak projek, dan selepas menyemak SPD Novaris di tapak projek, dan akhirnya mengeluarkan laporan bahawa memang ada defek pada unit. Walaubagaimanapun alasan yang diberikan oleh Novaris tidak dapat diterima oleh pihak DMU-PJH, Maintenance Contractor (di setiap Lot terlibat) dan JKR, oleh sebab terdapat keraguan jika dibandingkan dengan SOP JKR tersebut. Lagipun tidak ada sebarang laporan teknikal terperinci berkenaan isu LED dikemukakan. Laporan tersebut sekadar menyatakan bahawa LED rosak tetapi protection masih ada. Biasanya sekiranya ada perkara yang meragukan sebegini, pihak pengeluar kena buktikan kepada pihak kami samada daripada laporan pakar ataupun di tapak sendiri menunjukkan apa yang didakwa itu betul.
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[36] On the evidence, it is my finding that the continuously flashing of the green light on the devises rendered the devices defective. In the result, PJH's instruction for them to be replaced was not unreasonable. It was perfectly justified to instruct the plaintiff to replace them.

- F *Issue 4 : Whether The Second Defendant Gave A Fitness Warranty To Plaintiff?*

- [37] I now come to the fourth issue. The second defendant took the position that it had never given any warranty of fitness to the plaintiff and/or to the plaintiff's customers. It was the plaintiff that had given the warranty of fitness to its customers as expressly admitted by PW3 and PW4 in their evidence in cross-examination.
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[38] The second defendant relied on the following pieces of evidence in support of its case on this ground:

- H (a) All the plaintiff's delivery orders carried the warranty numbers for the SPDs to be delivered;
- (b) Every SPD delivered to the plaintiff's customers carried a sticker which bore a warranty number corresponding with the warranty number stated in the delivery orders;
- I (c) every SPD carried a warranty card; and

(d) the admission by PW4 that it was the plaintiff that had given its warranty to its customers.

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[39] On the other hand, the plaintiff relied on s. 16(1)(a) Sales of Goods Act to contend that it was entitled to rely on an implied warranty of fitness. The plaintiff contended that at all material times, the second defendant knew the purpose for which it had purchased the Novaris SPDs and it had relied on the skill and judgment of the second defendant to supply suitable devices.

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[40] Section 16(1) (a) of the Sales of Goods Act reads:

(1) Subject to this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

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(a) Where the buyer, expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not) there is an implied condition that the goods shall be reasonably fit for such purpose:

D

Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.

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[41] On this issue, it is clear on the evidence that the second defendant knew that the plaintiff relied on its skill and judgment to supply Novaris SPDs that would meet the specifications of PJH. On the facts, I agree with the plaintiff that the transactions in this case between it and the second defendant were based on an implied warranty of fitness as provided in s. 16(1)(a).

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Issue 5: If Yes, The Damages Claimable?

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[42] In its statement of claim, the plaintiff claimed for reimbursement of the expenses incurred to replace all the Novaris SPDs installed in the Putrajaya projects. It was averred in the statement of claim:

Alternatively damages in the sum of RM670,000.00 (being inclusive of cost of the Furse unit at RM1200 per unit and cost of installation);

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[43] In para. 29 of the statement of claim, the plaintiff alleged:

Owing to the failure of the Novaris SPDs and to mitigate its losses and any potential liability, the plaintiff has sourced and purchased an estimated 500 units of alternative surge protective devices known as the Furse ESP415M1 to replace all the Novaris SPDs at the Putrajaya Projects.

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A [44] The second defendant contended that in order for the plaintiff's claim for reimbursement to succeed, the plaintiff must adduce evidence to show:

- (a) The number of Furse SPDs installed in each of the Putrajaya Projects and its serial numbers;
- B (b) The number of SPDs together with its serial numbers which were then removed from each of the buildings of the Putrajaya Projects and the complaints thereto that the same were defective;
- (c) That the SPDs so removed in (b) above were then returned to the second defendant for repairs;
- C (d) The number of SPDs and serial numbers which were then collected back from the second defendant and evidence that the same were then installed back into the respective buildings.

D [45] In support of the claim for reimbursement, the plaintiff relied on the oral evidence of PW3. No purchase orders, delivery orders and invoices were produced to show the amount paid by the plaintiff to purchase the Furse SPDs. According to PW3, all the 636 Novaris SPDs installed at the Putrajaya projects were replaced.

E [46] The evidence led by the plaintiff, the second defendant contended, was insufficient to prove the expenses that had been incurred to replace the Novaris SPDs. The submissions advanced by the second defendant in relation to the evidence adduced by the plaintiff, may conveniently be taken from the written submission filed on its behalf and are as follows:

- (a) The plaintiff's pleaded case in paragraph 29 refers to "estimated 500 units".
- F This shows that there is no certainty in the number of units replaced.
- (b) It is also pleaded at paragraph 29 that the plaintiff has sourced and purchased Furse ESP415M1 to mitigate its losses and any potential liability;
- G (c) No evidence was led as to what was the potential liability. Neither is there any evidence before the Court that there was a claim filed against the plaintiff in respect of the so called defective SPDs;
- (d) Further, the plaintiff has failed to provide any documentary evidence relating to Purchase Orders placed by the plaintiff for the Furse units, the Delivery Orders for the receipt of the Furse SPDs, the Invoices to show the payment RM1,200.00 per unit of Furse SPDs including installation costs was incurred by the plaintiff;
- H (e) The plaintiff has also failed to prove the numbers of Furse units which were installed in replacement of the said SPDs and the buildings where it was installed.
- I

[47] It is trite law that a party claiming reimbursement must prove the actual loss it has suffered as a result of the breach committed by the contract breaker. The burden of proof incumbent on a party claiming damages is to place before the court sufficient evidence of the loss it has suffered. *McGregor on Damages* (Sweet & Maxwell, 18th edn., 2009) provides succinctly for this requirement at para. 8-001:

A claimant claiming damages must prove his case. To justify an award of substantial damages he must satisfy the court both as to the fact of damage and as to its amount. If he satisfies the court on neither, his action will fail, or at the most he will be awarded nominal damages where a right has been infringed. If the fact of damage is shown but no evidence is given as to its amount so that it is virtually impossible to assess damages, this will generally permit only an award of nominal damages; this situation is illustrated by *Dixon v. Deveridge* and *Twyman v. Knowles*.

[48] The same view was expressed in the case of *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635; [1989] 3 MLJ 360, Edgar Joseph Jr J (as he then was) said at p. 367:

It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right.

He added a little later:

On the question of the quality of evidence expected of a plaintiff, it is well to remember what Devlin J said in *Biggin v. Permanite* [1951] 1 KB 422 at p. 438, namely, 'where precise evidence is obtainable the court naturally expects to have it, where it is not, the court must do the best it can'. Nevertheless, it remains true to say that generally 'difficulty of proof does not dispense with the necessity of proof' (see *Aerial Advertising Co v. Batchelors Peas* [1938] 2 All ER 788 at p. 796 per Atkinson J). A case which affords an illustration of the requirement of reasonable certainty in this area is *Ashcroft v. Curtin* [1971] 1 WLR 1731 in which the plaintiff claiming for diminution of profits of his one-man business failed in his claim; even though the evidence pointed to a decrease in the company's profitability due to the injury, the records produced being too rudimentary and the accounts too unreliable to quantify the loss. So also when, here, the claim is for the difference between the contract price and a clear and undoubted market price, absolute certainty in proving damages is possible and therefore the court will expect precise evidence to be given.

[49] Applying these principles to the facts of this case, what the plaintiff produced was a price list (P8) showing that a Furse SPD cost RM914,68. It is in evidence that a total of 636 Novaris SPDs were installed in the buildings that came under the Putrajaya project. This is evident from an email dated 15 November 2011 from Phil to the plaintiff:

- A Hi Wee,
- ... First thing is, given the number of units involved we need to do something pretty quickly to make sure the problem is solved ASAP. We have given this considerable thought and I can offer the following comments/proposal on how we can deal with this situation.
- B
1. We need to proactively replace these units rather than waiting for 636 to be returned over the coming months/years. I think this is a given.
 2. Novaris will make a quantity of 100 pieces as change out stock to enable suspect units to be replaced prior to them failing.
- C
3. We tell the customer we are giving them a free upgrade as part of a global marketing strategy. We can draft something on Novaris letterhead if that helps ...
 4. Pekat's team replace 100 pieces at a time before the units fail.
- D
5. When Pekat return the first 100 pieces, we re-work them immediately and use them as next lot of change out of stock and so on until all units are replaced. We will make sure these change out units are in A1 condition so that item 3 above is credible to the customer.
- E
6. We negotiate the sharing of the costs to install the upgrades. I think we are in this together and need to look at some split of the installation costs, your thoughts?
- I appreciate that this may take some time, but I feel it is our only option. The units in the field now have a problem, they need to be replaced before they fail and this proposal will achieve this ...
- F
- [50] In a nutshell, it was the plaintiff's case that the email shows that all 636 units were replaced. In my view, the email does not establish that the 636 units were replaced. On the contrary, it merely shows that 636 Novaris SPDs were installed in the buildings that came under the Putrajaya project.
- G
- [51] The burden is on the plaintiff to show the number of devices that were replaced. It is to be noted that in para. 29 of the statement of claim the plaintiff had alleged that 500 units of Furse SPDs were purchased to replace the defective Novaris SPDs. It is a cardinal principle of pleadings that parties are bound by their pleadings. In the absence of any explanation as to how the number of units purchased became 636 from the original figure of 500, the plaintiff is not entitled to depart from its pleading.
- H
- [52] The best evidence to establish the number of units that the plaintiff had replaced and the expenses incurred in this connection, would be the relevant purchase orders, delivery orders and invoices. However, for some inexplicable reason these crucial documents were not produced. Instead, the plaintiff relied on documents that did not advance its case. The non
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production of the purchase orders, delivery orders and invoices, in my view, calls for the invocation of s. 114(g) of the Evidence Act 1950, that if produced, these documents would not support its case.

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[53] In the result, I find that the plaintiff has failed to prove the damages it has suffered by reason of the defective devices supplied to it.

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Issue 6: Whether Plaintiff Entitled To An Indemnity?

[54] The plaintiff next contended that it was entitled to an order that the defendants indemnify it against any claims that might be made against it in relation to the defective Novaris SPDs installed at the Putrajaya projects. In my judgment, if a claim is brought by a third party against the plaintiff, the plaintiff is entitled to seek indemnification from the second defendant by bringing the latter as a third party in those proceedings. I therefore do not allow the plaintiff's claim for an order that it be indemnified by the defendants in respect of any claim that may be brought against it in respect of the defective Novaris SPDs.

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Issue 7: Whether The Second Defendant's Counterclaim Sustainable?

[55] Lastly, I turn to the counterclaim filed by the second defendant. It sought damages in the sum of RM1,306,236.38 on the ground that the plaintiff had breached the distribution agreement between them. The facts relevant to counterclaim are that there was an oral agreement between the plaintiff and the defendants to appoint the plaintiff as the sole distributor of its SPDs products. The agreement was terminated on 28 May 2010.

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[56] Phil, in his evidence, alleged that the second defendant had terminated the agreement because the plaintiff had manufactured its own surge protective devices in competition with the Novaris SPD and had marketed and sold competitor's products such as Furse, Stecca, Studer, Schirtec, AREPS and ESL. This was discovered sometime in January 2012. This amounted to a fundamental breach of the distribution agreement and consequently the second defendant terminated the agreement.

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[57] It is apposite to mention at this juncture that the allegations which form the subject matter of the second defendant's counterclaim were not part of its initial defence dated 27 July 2013. It was only added in as a counterclaim on 24 July 2014. Its initial defence was that there was no distribution agreement between them.

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[58] In *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97, the Court of Appeal held that a trial judge when deciding whether to accept or reject the evidence of a witness, is required to test it against relevant criteria. He must take into account the presence or absence of any motive that a witness may have in giving his evidence. Where contemporary

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A documents exists, he must test the oral evidence of a witness against this. He must also test the evidence of a particular witness against the probabilities of the case.

B [59] In *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229, the trial judge accepted the oral testimonies of the defendant's witnesses and found the plaintiff guilty of fraudulent misrepresentation. On appeal, the Federal Court reversed the finding of fraud. It was explained at p. 234:

C Nevertheless the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.

E [60] A crucial piece of evidence to test Phil's allegation as to the reasons for the termination of the distribution agreement is an email dated 1 June 2012 sent by Phil to the plaintiff, just two days after the termination of the said agreement. The material portions of the email read:

F Therefore I have to confirm that we are seeking new distributors and than from Monday the 28th May 2012, Pekat is no longer the Novaris distributor for Malaysia.

G Please be assured that we will support you in any projects you currently have underway but we require you to nominate those projects and the products, with quantities involved, so we can protect you in the event of a new distributor trying to quote against you. We offer this support for the next 6 months, namely until the end of November 2012. Could you please provide this information by the end of next week.

H I need to advise you that as from Monday 28th May the following Novaris will no longer be manufactured but we will supply the products listed below. Please be assured that these products provide similar functionality with higher to those now obsolete.

I In regard to payment we will honour our arrangement for credit terms, namely 60 days from the end of the month for orders received up to Monday 20th May 2012. Thereafter we will expect payment upon delivery.

[61] This email is inconsistent with the second defendant's version that the termination was on account of the plaintiff dealing and selling its competitor's products. There is no mention of the plaintiff's breach. It is unlikely that the second defendant would have expressed gratitude towards the plaintiff for having assisted the defendants to have built "Novaris" to be a well recognised brand in Malaysia, if indeed this allegation was true.

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[62] Additionally, if the second defendant's claim is true, its failure to institute an action for breach of the distribution agreement until the plaintiff had brought this action, undermines its case. It is to be noted that in cross-examination, Phil accepted that the first defendant was aware during the subsistence of the distribution agreement that the plaintiff was selling competitive products. This fact had been disclosed to it by the plaintiff. In my judgment, the absence of any explanation for the delay in seeking damages for breach of the distribution agreement exposes the defendant's allegations made in support of the counterclaim to be completely lacking in substance.

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[63] In any event, there were no particulars or details to explain how the second defendant had arrived at the sum of RM1,306,236.38. According to Phil, the amount was based on the profits before and after the termination of the distribution agreement. In cross examination, he was asked the following questions:

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Q : Yes, that's done. Now you say here that subsequently the plaintiff realise from January to May 2012, there was a significant drop in the overall sales of the Novaris products to Pekat. Now my question to you is very straight forward. Did you ever mention this to the plaintiff? Now I give you an opportunity to go through the correspondence. There are lots of correspondence here. Can you let me know whether you have ever mentioned this to the plaintiff?

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A : I believe it was mentioned orally.

Q : So there is no document?

A : There is no document.

G

Q : Now your question, your answer to question 78. You are claiming for one, approximately RM1.3 million.

A : No. RM1.1.

Q : And is that your pleaded case. Is RM1.13 your pleaded case?

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A : That is what is in my Q & A.

Q : No. I'm asking about your pleaded case.

A : I don't know. I have to look.

Q : Can you refer to your pleaded case?

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A : Yes.

A Q : My lady, I object to that portion of it but I will take it up in submission. I don't want to question that at this point. So you're claiming for RM1.3 million, approximately.

A : Approximately RM1.3 million.

B Q : Okay for what period is that?

A : 2012.

Q : Sorry, I beg your pardon. Can you speak louder, I cant hear your answer?

C A : Yes. Question, answer to question 78, the total average sale for the years 2009, 10 and 11 amended to RM2.5708. This figure is arrived as follows.

Q : No, no.

A : Mr. Tompson, I'm asking this RM1.3 million approximately RM1.3 million is for which period?

D A : 2012.

Q : Which period of 2012, the whole year?

Q : The whole of 2012.

E A : Yes.

Q : Okay. So it is inclusive of before termination and after termination.

A : Yes.

[64] And, when DW3 was cross examined as to how the second defendant had arrived at the figure of RM1.306,236.38, his testimony was:

F Q : Can I take you to question 58 of your witness statement? Now you were talking about what was the total sales of the second defendant for all its products sold to Pekat for the year 2012? It you have stated there the total sales for the year 2012 was RM1.4 million approximately. 1.436,303.17. Now Mr Wong what is the basis for this figure? How did you come up with this amount?

G A : We have an accounting system to record all the purchase order and invoices out.

Q : Sure. Where are the documentation to support this?

H A : I need my counsel on the documents.

Q : So it's based on an accounting system?

A : Yes.

I [65] No documentary evidence was adduced to support the *viva voce* evidence of Phil and DW2 for the alleged losses suffered by the second defendant. It is trite law that a claim for damages must be strictly proved. The *ipsi dixit* evidence of Phil and DW2 is insufficient to prove that the sum

of RM1,306,236.38 was suffered by the second defendant as loss of profits on account of the breach committed by the plaintiff. It is incumbent on the defendant to produce the relevant supporting evidence satisfy the burden of proof to the requisite standard.

Conclusion

[66] For the reasons stated, I dismiss the plaintiff's claim against the first and second defendants. I further dismiss the counterclaim of the second defendant. The plaintiff to pay the first defendant costs of RM30,000. There shall be no order on costs in respect of the dismissal of the plaintiff's claim against the second defendant and the dismissal of the second defendant's counterclaim against the plaintiff.

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